STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHEMICAL TECHNOLOGY, INC.,
Plaintiff,

v.

Case No. 14-007723-CB

Hon. Daniel P. Ryan

AMERICAN EMPIRE SURPLUS LINES, A Delaware corporation, CAPITAL INSURANCE GROUP, an assumed name of BERKSHIRE AGENCY, INC., a Michigan corporation, CAPITAL INSURANCE GROUP AGENCY, an assumed name of BERKSHIRE AGENCY, INC., a Michigan corporation, BERKSHIRE AGENCY, INC., a Michigan corporation,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

At a session of Court
Held in Detroit, Michigan
2/20/15

This matter is before the Court on Defendant, Berkshire's[i] motion for summary disposition of Plaintiff's claims under MCR 2.116(C)(10). A motion under this subrule tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The Court considers affidavits, depositions, admissions, and documentary evidence when considering a motion brought pursuant to MCR 2.116(C)(10). *Id*., MCR 2.116(G)(5). A party responding to a motion under this subrule must prove by specific facts that a genuine issue exists. *Maiden*, 461 Mich at 120, MCR 2.116(G)(4). Neither allegations, denials nor the mere possibility that a claim may be supported by the evidence at trial will not prevent the entry of a judgment. *Maiden*, 461 Mich at 121.

Defendant challenges Plaintiff's complaint on three grounds: damages, causation, and breach of contract for failure to recommend replacement cost insurance and business interruption insurance.

Chemical Technology concludes that it was damaged when Berkshire breached its duty to Plaintiff by obtaining inadequate or improper insurance coverage for the Mount Elliott property. In its complaint, Plaintiff specifically alleges that Defendant Berkshire should have provided business interruption insurance and replacement value insurance instead of actual cash value insurance. Alternatively, Plaintiff also argues that the $1.4 million dollar actual cash value policy originally increased in 2010 and renewed in 2011, 2012 and 2013 before the loss was inadequate and should have been $3.8 million. Plaintiff argues that because the parties had a special relationship, that Berkshire owed Chemical Technology a duty to ensure that Plaintiff obtained the proper coverage. Chemical Technology points to the Marshall Swift valuation as evidence that the total damages incurred by Plaintiff far exceeded the policy coverage and that Berkshire did not obtain the appropriate coverage for the Mount Elliott property. Defendant notes that at no time did Plaintiff ever request business interruption insurance, replacement value insurance, or even notify the Defendant that it thought the $1.4 million dollar actual cash value policy was inadequate after the policy was issued in 2010 or renewed in 2011,2012 or 2013. The parties address the duty issue in the third argument. However, because damages cannot be considered in the absence of a breached duty, the Court must consider this issue first.

The Michigan Supreme Court clarified the special relationship rule and the creation of a duty between the agent and insured in *Harts v Farmers Insurance* Exchange, 461 Mich 1; 597 NW2d 47 (1999). As the *Harts* court noted, an insurance agent generally has no duty to advise the insured about adequacy of insurance coverage. *Supra at 8*. The Supreme Court modified the special relationship test which created the exception to the general no duty of the insurance agent to advise the insured rule to apply:

> when (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured.
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> *Harts*, 461 Mich at 10–11 (citations omitted).

In the absence of such a "special relationship," the general rule of no duty of an agent to advise the insured still prevails. In analyzing *Harts* criteria 1-3, in the present case, there are no allegations that Berkshire misrepresented the nature or extent of the coverage. Similarly, no evidence has been presented that suggests that Chemical Technology found the information ambiguous and sought or needed a clarification. The record does not suggest that Chemical Technology made an inquiry that Berkshire, although under no general duty to do so, gave inaccurate advice to Chemical Technology. Finally, there is no evidence of an express agreement or promise to Chemical Technology by Berkshire. Plaintiff claims that when Berkshire increased the coverage amount to $1.4 million in 2010 that the act of increasing the coverage amount was equivalent to *Harts* criteria 4 in that the agent assumed "an additional duty

by either express agreement with or promise to the insured." Increasing coverage amounts is not tantamount to assuming an additional duty, nor is it an express agreement or promise to the insured. As Plaintiff fails to establish the basis for any of the four enumerated exceptions to the general no duty rule, the Court cannot find that a special relationship exists which would create a duty for Berkshire to advise Plaintiff on the adequacy of its insurance coverage. *Zaremba Equipment, Inc. v Harco National Insurance, Co*., 280 Mich App 16, 27-28; 761 NW2d 151 (2008). Plaintiff argues the captive versus independent agent distinction that appears in some Michigan Court of Appeals cases and that because of the mere fact that Defendant is an independent insurance agent that it automatically owes a fiduciary duty to advise on coverage adequacy *Genesse Food Services v. Meadowbrook* 279 Mich App 649 (2008); *West American Ins Co. v. Meridian Mutual Ins* 230 Mich App 205 (1998). Unfortunately, it is not a distinction that the Michigan Supreme Court in *Harts* makes when carving 4 "special relationship" exceptions to the general no duty to advise on coverage adequacy rule. Although it was argued the defendant acknowledged duty in its responsive pleadings, the court is still not convinced that such a duty existed under *Harts.* Since the determination of whether a duty exists is a legal question, the Court finds that summary disposition is appropriate on this basis. *Harts*, 461 Mich at 6. Because the Court does not find evidence of the four *Harts* "special relationship" exceptions that Berkshire had a duty to advise Chemical Technology on the adequacy of the insurance coverage, there can be no similar finding of damages for a breach of a non-existent duty or causation.

While the Court has found that Berkshire owed no duty to Chemical Technology and that no basis exists to find damages, the Court continues its analysis on the issue of causation. This analysis may also be required because of some intermediate appellate cases such as *Genesse Foods, supra* and *West American, supra* which this court acknowledges discuss the existence of a fiduciary duty for independent agents. If one were to find that Berkshire owed Chemical Technology a duty, Plaintiff's complaint would still fail, as it cannot establish causation. Plaintiff's president, Gerhard Weber testified that he "was relying upon the insurance agent to provide me or us with the best policy that's out there." *Weber deposition* at 29. But he established no basis for this reliance. Mr. Weber also indicated that that he reviewed the financial statements used as the basis for valuing the property and accepted them as true. *Id.* at 15 – 16. He stated that he did not see a basis for supplementing the statements for purposes of determining the insurable value of the property. *Id.* Mr. Weber did not inquire into why the policy limits for the coverage changed, especially when the building coverage jumped from $218,000 to $1,400,000 in 2011 or in any subsequent year. *Id.* at 21 – 24. When asked about the various types of coverage, Mr. Weber testified that he did not know the scope of the coverage that he possessed. *Id.* at 25. Rather than actively participate in obtaining the correct coverage for his business, Mr. Weber seemingly blindly accepted the coverage presented to him.

It is well established that an insured has a non-delegable duty to read the insurance policy and raise any questions concerning coverage which they may have within a reasonable time after

issuance of the policy and, if the insured has not read the policy, he or she is nevertheless charged with knowledge of the terms and conditions of the policy. *Casey v. Auto Owners*, 273 Mich. App 388, 394-95 (2006); *Transamerica Insurance v. Buckley* 169 Mich. App 540, 546 (1988)*; Parmet Homes v. Republic Insurance,* 111 Mich App 140, 145 (1981) *lv. den* 415 Mich. 851 *(1982)).*

Chemical Technology cannot ignore its responsibility for providing accurate information to Berkshire nor can it excuse its duty to read the policy and ask questions about the insurance policy and the adequacy of the coverage that it provides by relying solely on that special relationship. *Farm Bureau Mutual Insurance Co. of Michigan v Nikkel*, 460 Mich 558, 567; 596 NW2d 915 (1999), *Parmet Homes, Inc. v Republic Insurance Co.*, 111 Mich App 140, 145; 314 NW2d 453 (1981). While not controlling, the Court notes that the Court of Appeals recently found that an insured failed to establish causation despite the existence of a special relationship when the party failed to read its policy. *Triangle Business Center, LLC v Hartford*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2012 (Docket No. 305504) p.8 (citations omitted). The same principle holds true in the case before the Court. Because Plaintiff either read its policy and failed to raise any questions within a reasonable time regarding inadequate actual cash value, the absence of replacement coverage, or business interruption insurance or alternatively, failed to read its policy in 2011, 2012, or 2013, it cannot now shift the burden for its loss to the agent who supplied it. For this reason, the Court also finds that summary disposition is appropriate on the issue of causation.

For all of these reasons, the Court grants Berkshire's motion for summary disposition as to Count I and II. This is a final order that resolves the last pending claims and closes the case per MCR 2.602(A)(3).

2/20/15
Date

/s/ Daniel P. Ryan
Hon. Daniel P. Ryan
Circuit Court Judge

[i] Berkshire is a Michigan corporate entity. Berkshire conducts business under the assumed names Capital Insurance Group and Capital Insurance Group Agency. For simplicity, unless otherwise indicated, the Court will refer to Berkshire or Defendant throughout this opinion and order.